

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

ERNEST W. MAURER,

Charging Party,

v.

COAST COMMUNITY COLLEGE DISTRICT,

Respondent.

Case No. LA-CE-4309-E

PERB Decision No. 1560

December 5, 2003

Appearance: Ray, Robinson, Carle & Davies P.L.L. by Sandra M. Kelly, Attorney, for Ernest W. Maurer; Rutan & Tucker by David C. Larsen, Attorney, for Coast Community College District.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Ernest W. Maurer (Maurer) to a proposed decision (attached) of an administrative law judge (ALJ). The unfair practice charge alleged that the Coast Community College District (District) violated section 3543.5(a) of the Educational Employment Relations Act (EERA)¹ by retaliating against Maurer for the exercise of protected

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

EERA section 3543.5(a) states, in part:

It shall be unlawful for a public school employer to do any of the following:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

activity. The ALJ found that Maurer established a prima facie case of retaliation. However, the ALJ found that the District met its burden to establish that it would have taken the actions complained of even in the absence of any protected activity. As the District established its affirmative defense, the ALJ dismissed the charge.

After reviewing the record in this case, including the ALJ's proposed decision, Maurer's exceptions and the District's response, the Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself, subject to the discussion below.

DISCUSSION

Neither party has filed exceptions to the ALJ's finding that the District's imposition of an administrative leave and Notice of Unprofessional Conduct on Maurer were motivated, at least in part, by unlawful animus. Maurer excepts to the portion of the proposed decision finding that the District would have imposed the administrative leave and Notice of Unprofessional Conduct on him even in the absence of protected activity. Specifically, the ALJ found that Maurer's repeated refusal to comply with the chain of command, his inability to accept supervision, and his unwillingness to peacefully coexist with his fellow employees constituted the primary motivation for the District's actions.

Although Maurer excepts to this finding, he has failed to identify any error of fact or law by the ALJ.² Instead, Maurer's exceptions focus almost exclusively on the fact that the District was partially motivated by animus, a point not in contention. What is in contention is whether the District would have taken the adverse actions even in the absence of Maurer's protected activity. The record contains numerous examples of Maurer's confrontational

²With one exception, Maurer has failed to identify any portion of the record to support his contentions. (PERB Reg. 32300(a)(3).)

attitude towards his superiors completely separate and apart from any protected activity. In light of this record, Maurer's exceptions must be rejected.

ORDER

The unfair practice charge and complaint in Case No. LA-CE-4309-E is hereby
DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

**STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD**



ERNEST W. MAURER, Ph.D.,

Charging Party,

v.

COAST COMMUNITY COLLEGE DISTRICT,

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CE-4309-E

PROPOSED DECISION
(1/7/03)

Appearances: Ray, Robinson, Carle & Davies P.L.L. by Sandra M. Kelly, Attorney, for Ernest W. Maurer, Ph.D.; Rutan and Tucker by David C. Larsen, Attorney, for Coast Community College District.

Before , .

PROCEDURAL HISTORY

On June 20, 2001, Ernest W. Maurer, Ph.D. (Maurer), filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Coast Community College District (District). The charge alleged violations of the Educational Employment Relations Act (EERA or Act).¹ On September 24, 2001, the General Counsel of PERB, after an investigation of the charge, issued a complaint alleging violations of subdivision (a) of section 3543.5.²

¹ All section references, unless otherwise noted, are to the Government Code. The EERA is codified commencing with section 3540.

² Subdivision (a) of section 3543.5 states that it shall be unlawful for a public school employer to do any of the following:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. . . .

On October 12, 2001, the District filed its answer to the complaint. The answer denied all material allegations and propounded various affirmative defenses. On November 14, 2001, an informal conference was held in an unsuccessful attempt to arrive at a mutually agreeable solution. On March 6, 7, and 8; April 23, 24, and 25; and June 17 and 18, 2002, a formal hearing was held before the undersigned. With the filing of the briefs by each side, the matter was submitted on September 18, 2002.

INTRODUCTION

Charging party alleges that due to his protected activities he was placed on administrative leave, involuntarily transferred from the Aviation and Space Department to the Mathematics Department, and given a Notice of Unprofessional Conduct. The District denies the charge, insisting that its actions were prompted by Maurer's inability to cooperate with instructors and administrators, and not by his protected activities.

FINDINGS OF FACT

Jurisdiction

The parties stipulated and it is therefore found, that Maurer is a public school employee and the District is a public school employer, within the meaning of the Act.

Background

The District is located in Orange County and includes three separate colleges. Full-time faculty members are represented by the California Federation of Teachers AFL-CIO, an affiliate of the American Federation of Teachers (Federation). There is a collective bargaining agreement (CBA) in effect between the District and the Federation that covers the faculty. The largest of the three colleges is Orange Coast College (OCC), Maurer's employment location. OCC's student enrollment is almost 28,000, with 350 full-time faculty, 450 part-time faculty, and approximately 150 classified staff employees. There are ten academic divisions within the

college, each presided over by a dean. Each division includes six to ten departments. The deans are assisted by Instructional Unit Assistants (IUAs) or department chairs, each of whom supervise one to three departments.

Maurer was originally employed in 1977 in an academic position at Golden West College, another District college. He transferred to OCC in 1979 and, in 1984, became Dean of its Technology Division, which includes the Aviation and Space Department. He remained in that position for approximately eleven years, where he supervised 12 or 13 departments with 100 to 150 employees.

When he was the Dean of Technology, Maurer had numerous conflicts with four faculty members in the Construction Department. Some of these conflicts had to do with the new Technology building, a project with which Maurer was intimately involved. He believed that the Construction Department faculty were not sufficiently involved in the plans for this building. Another area of conflict was the Construction Department's faculty class schedules. These faculty members filed a number of grievances over various actions Maurer took regarding their schedules. The grievances were ultimately resolved in favor of Maurer's position, as OCC's procedures state that the division dean has the final authority with regard to scheduling.

On February 21, 1995, Maurer's attorney, on his behalf and with his approval, wrote an eleven-page letter to the president of the Federation. The letter complained of an alleged three-year conspiracy by specified faculty members of the Technology Division to undermine Maurer's role as dean. The letter accused the teaching staff, with the cooperation of the Federation, of (1) acting in a criminally conspiratorial manner, (2) filing a false police report against Maurer, (3) malicious prosecution, (4) manufacturing confrontations, (5) recruiting students to impugn his relationship with other students and faculty, (6) describing Maurer in

negative terms when speaking privately with District administrators and members of the Board of Trustees, thereby denying him an opportunity to rebut their charges, (7) arriving at meetings with tape-recorders and video cameras, (8) “using Gestapo like tactics”, (9) accusing him of scheduling classes in such a manner as to “purposely see them fail” by their inability to attain sufficient enrollment, and (10) describing Maurer as using a systematic and calculated method of passive-aggressive mismanagement.

Maurer’s letter directed the Federation to (1) admit its wrongdoing, (2) retract its February 13, 1995, police complaint, (3) withdraw two specified grievances, and (4) tender \$225,000 to him.

Later that same year the management of the Construction Department was transferred out of Maurer’s control. At the time Maurer believed this transfer was an inappropriate way to solve what was primarily a clash of personalities. When the dispute became widely known, a petition of support for Maurer was signed by approximately 95 per cent of the employees in the Technology Division. Shortly thereafter, the department was returned to his control.

On February 27, 1995, three Construction Department faculty members sued the District and Maurer in Superior Court for various personnel-related matters. An answer to the plaintiff’s petition was due on March 24, 1995. On March 7, Maurer’s attorney wrote to Dr. John Renley (Renley), the District’s Vice-Chancellor for Human Resources, asking for “assurances that the District pursue the maximum disciplinary procedures and/or sanctions” against both the Federation and the involved employees. The letter goes on to recommend that the District file a cross-complaint for “libel, slander, malicious prosecution and abuse of process.” There was no evidence proffered at the formal hearing that Renley responded to the letter or took any of the requested actions.

On August 2, 1995, Maurer was removed from his position as Dean of Technology and given an assignment as the Administrative Dean of Career /Vocational Education. At the time, Maurer accused Chris O'Hearn (O'Hearn), OCC's Vice President of Instruction, of telling him that he "no longer needed me as Dean of Technology" and he was "fed up with the hassles with the Union and could not deal with them any longer."

On September 26, 1995, Maurer's attorney wrote to Dr. William Vega (Vega), District Chancellor. In this letter she decried the District's reassignment of Maurer, stating that it "provided a clear and improper message that his superiors were more concerned with Federation complaints and lawsuits than competent leadership."

On November 15, 1995, OCC President David A. Grant (Grant) wrote Maurer. The letter, in its entirety, is as follows:

Ernie, you have been directed not to interfere in the teaching of Aviation 130 on Monday and Wednesday evenings. You make it very difficult to defend you when you do not follow specific directions.

Do not attend that class; do not interfere with the instructor. If those directions are not clear to you, you should contact me.

In December 1995, Maurer was again reassigned; this time to a faculty position. When he asked for the reasons he was transferred, Renley responded with the following letter:

You have requested a statement of reasons for your transfer from Dean of Vocational Education to a faculty position. As you are aware, a dean is an important administrative position which requires smooth and positive working relationships with management and non-management staff members. Among other things, a dean must reduce, resolve and prevent conflict, develop and maintain good morale, and communicate effectively with members of upper level administration. Deans are important members of the management team, and the Dean of Vocational Education in particular must interface in a positive manner with the Vice President of Instruction for the College.

It was the conclusion of the Vice President of Instruction and the President of the College that your management style and methods

of interrelating with them and others did not produce a positive and effectively functioning team. Therefore, as indicated in my previous correspondence to you, you were reassigned to a faculty position “without cause” in the best interests of effective management and the needs of the District in accordance with paragraph 13 of the agreement signed by you on May 2, 1995.

On December 22, 1995, Maurer’s attorney sent a letter to David Mertes (Mertes), Chancellor of California’s Community College system, requesting a Title 5 investigation of the District. The letter also asked that “a suspension be placed upon filling of the position of OCC Dean of Technology and OCC President until the investigation is complete.” Maurer complained that various members of the OCC presidential selection committee failed to recuse themselves from evaluating his application, thereby precluding an objective evaluation of his written application for that position. There was no evidence submitted with regard to what action Mertes took, if any, in response to Maurer's request.

Maurer's attorney's letter went on to allege (1) improprieties in his involuntary transfer, (2) that improper and false communications were disseminated concerning him, (3) the District published false documents and denied him a scheduled evaluation, (4) that his due process rights had been denied, (5) the District failed to permit public testimony prior to his reassignment to a faculty position, (6) he was retaliated against due to his pursuit of his due process rights, and (7) that the governing board refused to give him written reasons for his transfer, as required by law.

On June 10, 1996, Maurer’s attorney sent a claim to the District in the amount of \$2,075,589 for breach of contract, unlawful transfer and demotion, harassment, denial of due process, retaliation and reduction of income.

In December 1996 Maurer filed a Complaint of Discrimination with the Department of Fair Employment and Housing, alleging his demotion from Dean of Technology was because

of my participation and involvement in a pending discrimination investigation which I am going to file with the Department of Fair Employment and Housing and pursue through court litigation.

In January 1997, the District and Maurer entered into a settlement agreement regarding the above-described claim in which Maurer received \$22,249 for accrued vacation pay and \$14,000 “for the purpose of enabling him to pursue retraining options.” Maurer contends that, as a part of this settlement agreement, the District told his attorney that it agreed not to transfer him out of OCC’s Aviation and Space Department.

An examination of that document reveals no such provision. To the contrary, the document contains a provision stating that

. . . no party is relying upon any representations or promises of the other except as expressly set forth herein.

After a hiatus for personal leave and updated training, Maurer returned to a full-time teaching assignment at the start of the fall semester, 1996, in the Aviation and Space Department. After an interim deanship of Dan Casey, Robert Mendoza (Mendoza) was selected to be the Technology Division’s dean. Mendoza had no experience in either space or aviation, but did have substantial background in vocational education, which is the division’s primary mission. Mendoza was assisted in his duties in the Aviation and Space Department by its IUA, William Padden (Padden), who was initially hired as a part-time classified flight simulator clerk/technician by Maurer in 1987. The department IUA’s responsibilities include schedule development, program review, advisory committee development, budgeting, and acting as a communication conduit between the department faculty and the division dean.

Maurer’s Protected Activities

The complaint in this case lists three separate instances of protected activities that Maurer alleges were the reasons for the negative personnel actions taken against him. These

three instances are (1) various complaints from January 2000 to May 2001 about working conditions, (2) a PERB charge filed against the District on May 24, 2000, and (3) May 25, 2000, and April 5, 2001, grievances.

Initial PERB Charge

On May 24, 2000, Maurer filed an unfair practice charge with PERB alleging, inter alia, that the District's retaliatory behavior was

directly related to the litigation pursued by him against the District when he was demoted from an administrative position as Dean of Technology to a classroom assignment. . . .

A PERB agent issued a warning letter stating that unless the charge was amended to cure various legal deficiencies, it would be dismissed. Although Maurer submitted additional information on September 25, 2000 the charge was dismissed. The dismissal was not appealed.

Robert Dees (Dees) and Margaret Gratton (Gratton), OCC's Vice President of Instruction³ and President⁴, respectively, were the parties responsible for Maurer's transfer and approval of his subsequent Notice of Unprofessional Conduct. Neither of them were directly involved in responding to the unfair practice charge, although they were aware of the charge having been filed. Renley was both aware of the charge and instrumental in the District's response, but insisted that this activity played no role in his decisions to place Maurer on administrative leave, serve him with a Notice of Unprofessional Conduct, or involuntarily transfer him.

³ Dees became the Vice President of Instruction in the fall of 1998.

⁴ Gratton was scheduled to retire during the summer of 2001.

Grievance of May 25, 2000

The District's grievance process originates with the grievant's immediate supervisor. It then goes through a college grievance officer, and the District headquarters before going to advisory arbitration. The college grievance officer was Don Ackley (Ackley). Neither Dees⁵ nor Gratton were directly involved in the resolution of any of Maurer's grievances.

Many of Maurer's grievances involved, inter alia, his complaints about not receiving his requested class schedule(s). None of the grievances were taken to the advisory arbitration level of the grievance procedure by the Federation.

The subject matter of Maurer's May 25, 2000, grievance was included in his May 24, 2000, PERB charge. The grievance complained of scheduling decisions and communications between Maurer and Mendoza. Maurer's requested remedies were that he be awarded (1) the relief requested in prior defaulted grievances⁶, (2) a rescheduling of his classes, and (3) the rescission of two "reprimand letters dated May 19 and May 22, 2000." In addition, he requested that the administrative functions of the department be reassigned from the control of Mendoza to "a 'neutral' administrator."

It is apparent, from both the documentation and his testimony, that Maurer believes he has a right to his requested grievance remedy if the District administrator fails to respond within the time set forth in the third step of the grievance procedure. He buttresses this argument by stating that Dees called him on January 31, 2000, and left a message admitting that the District defaulted on one of his grievances and stating that, therefore, he (Maurer) would be awarded his requested remedies. Dees initially denied making such a phone call.

⁵ Dees was contacted by Maurer at one point with respect to a grievance in which the District's response was allegedly untimely. Dees attempted to assist the process by contacting Renley's office. Renley and Dees met in an effort to chart out exactly what grievances were pending, but Dees was not involved in any of their resolutions.

However, a recording of this phone message was played at the formal hearing.

Although the message was not unequivocal, Dees said:

. . . But it looks as though you're right, he [Renley] didn't answer anything, so it's yours by default. . . .

Once he heard the recording, Dees was reminded of the call. However, he said he did not intend to guarantee that Maurer would receive his requested remedies. He believes that Maurer knows, from his prior experience as a dean, that Dees' word is not final on such matters. Under the District's procedures Renley is the person in charge of grievances, and everyone else merely speculates about what his ultimate decision will be.

An examination of the CBA shows that, at the first two levels of the grievance procedure, a failure of the administrator to respond merely entitles the grievant to proceed to the next level. With regard to the third level, the CBA states that the District's failure to provide a response within the proper time, "will result in award of the remedy sought by the Federation." (Emphasis added.) Based on this language, Maurer is not entitled to be awarded his requested remedy since he is not the Federation. Renley's un rebutted testimony showed that his relationship with the Federation permitted each side to periodically request and routinely receive an extension or tolling of the procedure's time lines.

There is nothing in the CBA, or any other District policy, that gives an instructor a right to demand either a specific supervisor or schedule.

Grievance of April 5, 2001

This grievance complained of Mendoza's alleged deficiencies regarding (1) scheduling, (2) the advisory committee, (3) program review, and (4) his failure to appoint Maurer as the departmental IUA. These issues, according to information supplied by Maurer on the first

⁶ Maurer's use of the term "defaulted grievance" refers to a grievance that received no response within the time frame required by the CBA.

page of his grievance form, were discussed in an informal conference with Mendoza on February 15, 2001, or more than 45 days prior to the filing of the grievance. The CBA requires that grievances be filed within 20 days after the facts become known to the grievant.

Maurer's grievance contained the following requested remedies: (1) the "assignment of a 'neutral' administrator (Kevin Bellinger⁷)" to assume supervision of the Aviation and Space Department, (2) the assignment of the class schedule he originally requested, and (3) a specified allocation of training funds. These remedies are not within the jurisdiction of the grievance procedure.

The grievance was denied, due to untimeliness, at all three levels. The Federation declined to appeal it to advisory arbitration.

Areas of Conflict

Intra-departmental

Class Scheduling

Under the CBA, OCC's individual professors/instructors have the right to submit a requested class schedule. The college is ultimately responsible for the overall student class schedules, but it has a contractual obligation to not arbitrarily disregard the individual faculty members' preferences.

According to Maurer, prior to Mendoza's becoming the technology dean, the aviation and space instructors, both full-time and adjuncts, would meet and collectively develop the next semester's class schedule. This schedule would be forwarded to whomever was IUA or dean. S/he would rubber stamp it and it would become operative the following semester. Under this system, Maurer believes that when he was dean he changed no more than 2 percent of the schedules submitted to him by the various departments. Once Mendoza became the

⁷ Kevin Ballinger is OCC's Dean of Career Education.

dean, scheduling in the department became considerably more complicated, with little or no real authority vested in the faculty. Maurer contends that the other departments in the division and in the college are still following the historical process described above.

Maurer, Padden, and Mendoza had a series of conflicts over which classes each of the instructors should be assigned. Maurer's relationship with Padden was adversarial. He would often bypass Padden by sending his proposed class schedule directly to Mendoza. Maurer stated that he initially (three of the first four semesters after he returned to a teaching position) sent his requested schedules to Padden, who would not provide sufficient information to enable him to develop a department-wide comprehensive schedule. Padden insisted that Maurer, who has no responsibility for a department-wide schedule, never sent him (Padden) his requested class schedules.

After his relationship with Mendoza deteriorated, Maurer routinely sent his requested class schedules to Dees, Mendoza's immediate supervisor. In addition to his own, Maurer often submitted a proposed schedule for all of the other instructors in the department, as well as one for the IUA, Padden. Maurer explained this action by stating that the other instructors knew what schedules were necessary for the students, but they were reluctant to battle Mendoza and Padden over the issue. Dees told Maurer to stop submitting proposed schedules for all of the department's faculty and to stop sending his schedules to him (Dees) instead of Padden or Mendoza. Maurer listened, but continued to send Dees the comprehensive schedules.

After each of Maurer's submissions, Mendoza, Padden, and Maurer would unsuccessfully attempt to develop a compromise and/or comprehensive department class schedule. At one point Mendoza suggested alternating requested courses between the two instructors. Maurer rejected this approach, citing, inter alia, Padden's alleged failure to

maintain current Federal Aviation Agency (FAA) certifications and his own updating of curriculum and modern delivery techniques. Eventually, Mendoza would unilaterally impose and disseminate a class schedule.

These problems occurred continuously from the time Maurer returned to a teaching assignment in 1996 to the time he was transferred out of the department. Much of this activity preceded January 1999, the date of Maurer's first formal grievance and May 2000, the date of his first PERB charge.

A typical scenario would play out each semester. Maurer would submit his proposed schedule. He would get some, but not all of his requests and according to Maurer, even those he got were either at the wrong time or in the wrong classroom. In addition, some of his classes would be cancelled due to low enrollment. He would then be placed back in the scheduling mix in an attempt to create a full-time load by taking over classes that had tentatively been assigned to adjunct instructors. As a full-time instructor, he had a right to such reassignments, but the issue of which classes he would receive and in what classrooms they would be taught, created additional conflict between him, Padden, and Mendoza. Maurer would then file grievances over the resulting schedules, but they were routinely denied at the primary levels and eventually not taken to arbitration by the Federation.

Padden retired in January 2001 for two reasons: (1) a golden handshake was offered to all employees; and (2) the hostile environment created by Maurer after he came back to the department as an instructor.

Maurer contends that one of the problems in developing a departmental schedule was that Padden was either unable or disinclined to teach any of the advanced courses for commercial aircraft, the turbo class, because he was not rated in jets. According to Maurer, all Padden wanted to teach was his private ground school class and a couple of other classes.

Maurer believes the department's scheduling problem arose when Padden would not create a schedule that permitted Maurer to teach the more advanced classes. Maurer attributes this to Padden's personal animosity towards him; an animosity that Maurer complains was backed by Mendoza's control of the department's scheduling process. Maurer admits that he also harbored animosity toward Padden, due to his belief that Padden was instrumental in having him removed as Dean of Technology. However, Maurer contends that it was Padden's animosity that was the primary cause of the intra-departmental conflict.

Padden denies any role in Maurer's removal as dean, and he disputes Maurer's contention that he had a limited range of teaching abilities. He insists that, with the exception of the space courses, both he and Maurer were qualified to teach all of the District's aviation courses. According to Padden, the problem was created when Maurer decided that he, and only he, should teach specified advanced courses.

To a large degree, Maurer's frustration over the scheduling of classes resulted from what he believed to be a considerable disparity in his education and experience in the field of aviation and space compared to that of Padden and Mendoza.⁸

Mendoza has no aviation training or experience.

⁸ Maurer received bachelor and masters degrees in technology and education from Kent State University in the early 1970s and a Ph.D. from UCLA in 1976. He holds a FAA license which enables him to fly as a commercial pilot, with specialized ratings for turbo-jets, helicopters, gliders, seaplanes, and multi-engine aircraft. He holds an instrument rating, is an instrument instructor, and both a basic and an advanced ground instructor.

Padden flew jet fighter airplanes in the U.S. Air Force for six years. He next worked for United Airlines as a co-pilot and a flight engineer, then a co-pilot for the Flying Tiger lines for a number of years. After that, he then went into corporate aviation as both a sales manager and a corporate pilot for a number of organizations. He also became a flight instructor during this time. From 1995 to 2001 he held a commercial pilot's certificate with an instrument rating for single and multi-engine land planes, ground instructor's advance and instrument ratings and a flight instructor airplane and flight instructor instrument ratings. Padden admitted that he allowed some of his licenses and/or ratings to become inactive between 1994 and the late 1990s due to his college responsibilities. He also admitted he has no space-related experience.

The adversarial pattern with regard to departmental scheduling was repeated in determinations over the budget and the appropriate classroom(s) for their individual assignments.

In addition, Padden and Maurer also argued over whether Maurer locked up departmental property in such a manner as to prevent Padden's access. Maurer insisted the secured materials were his personal property.

Maurer accused Padden of discarding the FAA aviation instructional tapes that he (Maurer) was instrumental in having donated to the college. Maurer insisted that they were worth approximately \$15,000. Padden said that in 1996 he permitted the tapes to be donated to various civic groups, such as the Boy Scouts and various flight schools, because they were antiquated and virtually worthless for the purpose of teaching aviation classes at the college level.

Maurer admits he was angry over Padden's role in this matter and his subsequent refusal to admit any complicity in their disappearance. He insists that the issue continues to be an embarrassment to the college, because there are still periodic requests to borrow the tapes.

Padden rejected Maurer's contentions that he improperly donated these tapes, pointing out that he was the IUA at the time the films were donated and Maurer was not even a member of the Aviation and Space Department; he had recently become the Dean of Career Education. Padden added that Maurer never let this issue rest. At every meeting and in many memos from the time the incident occurred until Padden retired, Maurer continued to bring up the removal of the FAA tapes.

In addition, Maurer was frustrated over Mendoza's (1) refusal to put anything in writing, (2) delay in approving routine requests, (3) habit of forgetting agreements he made, (4) super sensitivity to even the most minor of criticisms, (5) repeated postponing and

rescheduling of meetings, and (6) continually sending out Aviation and Space class schedules weeks after the rest of the college had received theirs.

Padden admits that Mendoza created a lot of work for the faculty, is not a disciplinarian, does not use his staff effectively and does not have a very good recall of incidents that occur in meetings. He said that a lot of time was spent in meetings refreshing his memory. In general, Padden believes that Mendoza is an ineffective manager.

Beginning with Vice President of Instruction O'Hearn's departure in 1995, and with Maurer's subsequent demotion to a faculty position, Maurer believes a campaign of harassment against him began. He insists that this campaign continues up to the present day, in an on-again, off-again manner, with Mendoza as one of its primary proponents.

Class Cancellation

Superimposed over the question of which class each instructor was to teach, and in what classroom, was the issue of the college's policy of canceling classes due to insufficient enrollment. Maurer insists that Mendoza purposely scheduled his classes on days and at times that would increase the likelihood that they would not attract sufficient enrollment to remain open. In addition, he insists that many of the classes that were cancelled would have eventually attracted sufficient students if Mendoza had not cancelled them well in advance of the first day of class. He contends that, historically, classes have been permitted to meet at least twice before being cancelled. He states that Mendoza cancelled two of his second semester courses (scheduled to start in late January) before the Christmas break.⁹ Mendoza, while admitting he cancelled the classes, denies the charge of purposely scheduling Maurer's classes at such times so as to facilitate their failure to attract sufficient enrollment.

⁹ Mendoza states that, at the same time that he cancelled Maurer's classes, he also cancelled four other division classes, i.e., one in the Machine Department, one in the Aviation Maintenance Department, and one in the Construction Department.

Dees stated that one of the ways he was attempting to increase OCC enrollment was to cancel low enrollment classes. The Technology Division had one of the highest rates of low enrollment classes. He specifically told deans throughout the college not to wait until the first or second week of the semester to cancel a class, as it created too much havoc on the students' schedules and disrupted faculty schedules.

Maurer contends that, in the past, if an instructor had an introductory class of thirty or more students, s/he was allowed to keep a highly specialized class of less than eighteen (the CBA mandated minimum class level). Mendoza did not follow this “averaging out” pattern.

Advisory Committee

The Aviation and Space Advisory Committee consists primarily of members of the aviation community and college students. It meets annually to review the department’s program and make proposals for content amendments. These meetings are state-mandated and college administrator participation is important, if not crucial. When he was the Technology Division Dean, Maurer hosted over 100 advisory committee meetings. After he returned to a faculty position, he continued to be the program coordinator for the committee. The coordinator routinely creates an agenda agreeable to all members of the department, the IUA and the division dean. Once the agenda has been approved and disseminated, the meeting is held, and the coordinator prepares proposed minutes for the IUA and division dean’s approval.

Maurer believes that Mendoza refused to respond to proposed agenda submissions and meeting dates. Maurer insists that this inattention to the committee’s business led to his unilaterally agendizing items without first receiving Mendoza’s approval. Maurer also complained about an instance that occurred in April 2001. Maurer had earlier submitted approximately sixteen alternate dates for an advisory committee meeting. Later, his circumstances changed, and he was not able to attend one of those dates due to family

responsibilities. He contends that Mendoza, knowing he was unavailable, selected that date for the meeting. Mendoza insists he did not know of Maurer's family situation, although Maurer states that he previously informed him of the circumstances. When the meeting was held and various participants inquired as to Maurer's whereabouts, Mendoza claimed ignorance.

One year Mendoza attempted to cancel the annual advisory committee meeting. Ballinger told him he did not have the authority to do that, so the meeting occurred. However, Mendoza failed to attend, insisting that he had to attend the weekly curriculum meeting instead. This obvious slight to the committee incensed Maurer. In addition to his personal unhappiness, Maurer states that the committee members were very vocal in their criticism of Mendoza's failure to attend and respond to questions they had about the department's management.

After each committee meeting was held, Maurer prepared minutes that purportedly highlighted members' criticism of Mendoza and his management style. Mendoza, after examining Maurer's proposed minutes, checked with other participants with regard to their accuracy. Mendoza said they told him the proposed minutes did not accurately reflect what occurred at the meeting.¹⁰ Mendoza told Maurer what he had learned and insisted upon revisions to the minutes. Rather than revising them, Maurer sent them to Ballinger, the individual with overall responsibility for vocational education. Ballinger merely sent them back to Mendoza, as he was the appropriate person to review them. Shortly after this meeting, Mendoza removed Maurer as the department's committee liaison.

¹⁰ In his testimony, Padden admitted students at the advisory committee meeting made hostile comments about Mendoza.

At some time after Maurer had been removed as the committee liaison, Ballinger called him and told him that Mendoza had only invited one-third of the members of the committee to the annual meeting. Maurer had not been told of the time or place of the meeting. This selective invitation list, along with Mendoza's attempt to cancel the committee meeting the previous year, reinforced Maurer's belief that Mendoza was attempting to minimize the department's potential for success, as well as Maurer's role in the department.

Program Review

Every six years, each department must develop an internal written program review, covering such subjects as curriculum, retention of students, courses offered and whether the unit was meeting industry needs. Initially, Maurer was given the responsibility for developing a draft of such document. He states that he received input from many different sources over a period of one-and-one-half years. He said that much of this input was critical of Mendoza's stewardship. Although Maurer, Padden and Mendoza met more than nine times over several years, no agreement with regard to the written program review could be reached. Maurer insists that the conflicts centered around Mendoza's attempts to water down the criticism of his management of the department.

Dr. Bill Briese (Briese), OCC's program review coordinator, told them to "agree to disagree" and put both views in the report and send it to the administration. The parties could not even agree to follow that approach. Shortly after Maurer left the department, Mendoza submitted his program review report.

IUA Selection

Maurer explained that, throughout the campus, the IUA has traditionally been a full-time faculty member from the involved department, who is elected, not appointed.

As early as mid-1998, Maurer's disputes with Padden had escalated to the point that he called for Padden's ouster as IUA. He requested Mendoza take over direct supervision of the department. On September 16, 1998, Maurer sent a memo to Mendoza, with a copy to the college president and Dees, advocating an "ACTION PLAN" for the department. The memo, in pertinent part, is as follows:

I am very sorry that I have to resort to a paper trail to secure help for our students and department over issues that have been building over the past two years. Having borne the subtle and not so subtle effects of Mr. O'Hearn's^[11] actions, I cannot allow misleading documentation memos to go unchallenged. Unfortunately, the motives and timing of this ACTION PLAN may be questioned with the departure of the Vice-President of Instruction. I have spent the summer trying to secure resources which could benefit the students and department. Your habit of not responding to specific issues in writing has resulted in confusion and inaction. Clearly the current environment in the division is one of disabling actions rather than enabling support.

Over the past two weeks, your actions can only be characterized either as inattention to important matters-i.e. schedule, secured storage of teaching materials, and fielding of student complaints; or a policy designed to harass and introduce as much chaos as possible into the department. If the goal is to shut the department down and hasten my departure, as Mr. O'Hearn desired, then it should be put on the table for advisory committee and community debate. I have suggested with our needs for campus instructional support and declining enrollment, that much of your time should be spent facilitating solutions and interfacing with campus offices to solve problems related to Aviation & Space. Nothing can hurt a college or affect morale more than the loss of a department because of neglect. Instead, the students and I get very little of your time or help in following up on campus issues or instructional roadblocks. Your memo of September 9 is a classic CYA memo and does nothing to solve the problems at hand. Since your actions will affect the viability of the program, I will respond first to the scheduling issues of spring semester, and then proffer an ACTION PLAN to move us forward. I'm sorry if parts

¹¹ Chris O'Hearn was the outgoing college Vice President of Instruction. Maurer and O'Hearn had many conflicts over the years. Maurer was convinced that O'Hearn's ultimate objective was to shut down the Aviation and Space Department and to eliminate his (Maurer's) position at OCC.

of this seem [sic] to be placing blame, but such is the nature of the problem as you have defined it.

In December 2000, Padden retired early from his full-time position, due at least in part to his battles with Maurer. Rather than appointing Maurer to the vacant IUA position, Mendoza appointed the Air Power and Frame Department IUA, Rodney Foster (Foster), to the position, in addition to his own. Maurer points out that the pilots and mechanics have little in common. A more natural linkage would have been pilots and flight attendants, two groups that have much of the same training and share the same advisory committee.

On December 15, 2000, Maurer complained to Dees of Foster's appointment, which he characterized as Mendoza's "unilateral revocation of the Aviation & Space IUA," insisting that Mendoza "[a]t the very least, . . . should have consulted the department on the impact of the retirement of Bill Padden."

However, Dees had previously suggested to Mendoza that, when he had the opportunity, he should reduce the number of IUAs in his division. In recognition of the additional burden of their position, the IUAs receive a stipend in the form of release time. Dees did not believe an IUA for a department of one or two full-time faculty was a good use of these budgetary funds. Since Maurer's departure, Mendoza has consolidated the Construction, Computer High-Tech, and Heat and Ventilation Departments under one IUA.

Once Foster realized he was not going to be effective in lowering the conflict level among the Aviation and Space Department faculty, he resigned this extension of his IUA position on February 1, 2001. Mendoza assumed the IUA duties and responsibilities of the department himself. After Maurer left the department, Foster resumed his Aviation and Space Department IUA position.

Attempt to Reassign Department

In the fall of 1998, Dees was the interim Vice President of Instruction. He was later given the position on a permanent basis. Maurer, who had a positive relationship with Dees when they were both deans, began to submit departmental matters directly to him. These matters included scheduling preferences, conference requests, and field trip requests. Dees consistently referred these requests back to Mendoza and encouraged Maurer to follow the chain of command.

Maurer also attempted to circumvent Mendoza's supervision by urging Dees to either personally take over the department or reassign it to another division. Dees discussed the possibility of such a move with Renley, the Federation leadership, and two other division deans. The two deans told Dees that they were not interested in having Maurer under their supervision. The general consensus was that the reassignment of the department was not a practical solution.

Reassignment Request to President

When Maurer was unable to convince Dees to either take over the department or to assign it to another division, he wrote to OCC President Gratton on March 22, 2001, requesting that she (1) implement his requested modifications in the department's fall 2002 class schedule, and (2) immediately place the department under the supervision of Ballinger. On April 4, Maurer again wrote Gratton complaining of more of Mendoza's alleged inadequacies. In response to these two letters, Gratton scheduled a meeting with Maurer for April 27. Dees was invited due to his instruction responsibilities. According to Maurer, he was directed to attend the meeting by Gratton's secretary, but was not told of its purpose, however, he believed that there was no hint that the meeting was going to be disciplinary in nature. Maurer, in an exercise of caution, called the Federation for representation, but he did not believe it was

necessary to wait to begin the meeting until his Federation representative, Paul Jordan (Jordan) arrived. Maurer hoped the meeting was called to seek a solution to what he characterized as Mendoza's lack of effective communication with the department. He states that his emphasis in the meeting was to solve what he believed to be the students' problems, i.e., the department was offering the wrong courses, at the wrong times, and in the wrong classrooms.

Maurer states that he was originally told the meeting would last thirty minutes. However, when it went on for forty-five, he contends that it conflicted with one of his scheduled classes, so he left. This contention is not credited. Gratton stated that the meeting lasted between thirty and forty minutes. At another point in his testimony, Maurer stated the meeting lasted thirty-five minutes.

Maurer claims that at this meeting both Dees and Gratton stated that they were not going to waste any more time on his grievances or PERB complaints. Both Dees and Gratton denied any mention of Maurer's grievances or PERB complaints.

During the meeting, Maurer made it abundantly clear that because Mendoza would not act to solve the department's problems, the only plausible solution was the transfer of the department from Mendoza's division. He admitted that he could not work with Mendoza.

Gratton and Dees said that they initially attempted to direct Maurer away from past complaints and toward a future resolution of the ongoing conflict. However, they were not successful, as Maurer told them that it "had to be me or the Dean." Maurer denies making such a statement, insisting that it would be ridiculous for him to say something like that because he knew what their choice would be.

Dees, having already determined that a reassignment of the department to a different dean was not feasible, eventually responded to Maurer's concerns by asking him what math classes he would like to teach. In effect, this question told Maurer that he was being

transferred out of the Aviation and Space Department. After a brief period in which the two men just stared at one another, Maurer abruptly stood up, gave Dees his attorney's business card, and walked out. Dees states that Maurer said, "I can see where this is going, talk to my attorney." Maurer insists that he merely said that if either Dees or Gratton had any further questions of him they should FAX them to his attorney.

Gratton, who was surprised by Maurer's abrupt termination of the meeting, discussed the situation later with Dees. She concentrated her remarks on the fact that Maurer had clearly expressed his unhappiness with his dean, Mendoza, his vice president, Dees, and had just walked out of a meeting with his college president.

Both Dees and Gratton believed that Maurer could not be left in the Technology Division, as he was hurting the program by his interference with, and combative attitude toward, the dean. They agreed he had to leave the department. Dees made arrangements to talk to Renley about effecting such a transfer.

Administrative Leave

On May 10, 2001, Maurer received a voice mail from Gratton's secretary requesting his presence at a May 14 meeting with Gratton and Dees. The message described the meeting as a continuation of their earlier talks. When he arrived with Jordan he was met by Renley, Dees, and Gratton, who informed him that he was being reassigned due to his inability to work with Mendoza. In addition, Renley said he was being placed on immediate paid administrative leave, pending an investigation of safety concerns. The meeting lasted approximately thirty minutes.

Maurer was surprised by this sudden decision. He explained that ordinarily he would expect due process to require his being given (1) an advance copy of any pending charges against him, (2) an opportunity to personally rebut them with a Federation representative

present, (3) a written list of the reasons he was being put on administrative leave, and (4) an opportunity to provide his rebuttal to whomever was assigned to investigate the matter.

Instead, he was told he would immediately be escorted to his office by Vice President McIlwain, where he could pick up whatever he could take with him. He was then to turn in his keys to everything but his personal office, leave campus, and not contact anyone on campus, including students. Renley agreed to let him delay a wholesale removal of personal belongs from his office until the completion of the investigation, which he anticipated would take about two weeks. Maurer states that he later forwarded his grade rosters to Gratton, but Padden, his substitute teacher for the remaining few weeks of the semester, never received them. Consequently, all students in one class were given grades of A. Later on the day that Maurer was escorted off campus, Dees met with OCC's deans and told them that Maurer had been removed as a security risk and that he had been instructed not to come on campus. No questions or further inquiries were permitted.

Renley testified that on at least four other occasions he has removed an employee from the campus. Two of the instances involved classified employees and one involved an administrator. Therefore, these occasions did not directly disrupt classroom activity. In one instance there was an allegation that an English instructor stated that “if he had a machine gun, he would go postal.” Renley removed him from the classroom and campus. There was no other evidence regarding any of the circumstances surrounding this case.

When Renley reported the reassignment and administrative leave to the Chancellor and Board of Trustees on May 16, 2001, he prepared a short biography of Maurer. In it he made references to Maurer’s having “filed several grievances, including unfair labor practices with PERB against both the CFE and the District (both dismissed)”

Renley made the decision to place Maurer on administrative leave after Mendoza and Dees expressed concerns regarding their safety. In addition, at some undetermined time in the past, Judy Olson (Olson), a faculty member in the flight attendant program, expressed concerns to Mendoza about her safety around Maurer. Mendoza said that Federation President Tina Bruning (Bruning) also warned him that Maurer was a threat to his safety. This was in reference to a February 1995 incident in which Maurer, then OCC's technology dean, and Bruning confronted one another. Bruning accused Maurer of assault; he insisted that he merely brushed by her in a doorway while exiting a room. She filed a police report on the incident. The administration investigated the incident and resolved it in favor of Maurer.

The District also referenced complaints of alleged threats by Maurer against a Construction Department instructor named John Waters (Waters). Maurer was not aware of these allegations until he first learned of them in documents subpoenaed in this case.

Mendoza also related a conversation he had with David Grant (Grant), a former OCC president, in which Grant told him that "I saw that look in his eye and I thought he was going to kill somebody."

Mendoza testified that he was so concerned about his safety that he obtained two bulletproof vests; one for himself, and one for Dees.

Maurer states that at the May 14 meeting he was told by Renley that he would be (1) told of any discipline in advance, (2) given access to any third party investigator with opportunity for input into the process, (3) given a report of the investigative results, and (4) eventually given a copy of written charges, if any. Renley disputes part of these assertions, stating that he merely told Maurer that he would give him a copy of the investigative report only if the District took some action as a result of such report.

Renley used the services of an investigator who was affiliated with the District's attorneys. This investigator conducted interviews with various campus personnel. In addition, he attempted to contact Maurer. However, Maurer states that he did not receive a message from the investigator until Friday, May 17, 2001, when he was in Oklahoma City attending a weekend seminar. The message¹² stated that if Maurer wanted to have any input in the case, he should come to the District office the next morning. No alternative date was given. Maurer's attorney called the investigator complaining about the short notice and informing him of Maurer's geographic unavailability. The investigator and Maurer never met.

Although the investigator did prepare a report, it was neither given to Maurer nor entered into evidence at the formal hearing. Renley said that the report concluded that although Maurer was intimidating, there was no evidence of "actual physical violence." The District asserts that it took no action as a result of the report.

Renley merely informed Maurer and his attorney that the investigation was complete, and that Maurer would be permitted to return to his teaching duties at the start of the fall semester. When he returned to the campus, Maurer was assigned a classroom in the Technology Building that was closer to Mendoza's office than his previous office. Maurer's new classroom is on the second floor directly above Mendoza's office, whereas his previous office was approximately 250 feet away, near the back of the building, with a nearby exit. This new office/classroom alignment provides considerably greater potential for random contact between the two men than there had been prior to Maurer's administrative leave.¹³

¹² The record is unclear if the message was left on Thursday, May 16 or Friday, May 17.

¹³ When Dees became aware of this classroom/office proximity situation during the formal hearing in this case, he notified OCC's classroom scheduler to make sure Maurer's fall 2002 classrooms, were not in the Technology Building.

Maurer sees this as an inconsistency in the District's contention that he was a potential physical threat to Mendoza. The alleged threat to Mendoza was a major part of the basis for his exclusion from the campus and the "violence" investigation.

Shortly after the events of September 11, 2001, an OCC political science instructor engaged in a heated discussion of Israeli-Arab historical confrontations. He was subsequently accused of allegedly making improper statements to students of middle-eastern ethnicity. The instructor was placed on administrative leave pending the results of an investigation. The college contracted with an outside agency, the Orange County Office of Education, to investigate the facts in that case. The college characterized this process as a third party review. Once that investigation was completed, a copy of the resulting report was given to the involved instructor. The instructor was reinstated to the classroom, but given what he characterized as a letter of reprimand. The District asserts that the letter it gave the instructor was not a letter of reprimand, as it did not meet the CBA formalities for such a letter.

In addition, an instructor in OCC's Technology Division was accused of sexual harassment of a student. His case was investigated by the same person OCC used in Maurer's case. Renley does not believe that the involved instructor was given a copy of the investigative report.

Unprofessional Conduct Charge

Renley contends that because of Maurer's history of difficult relationships with other members of the staff, he decided to give him a Notice of Unprofessional Conduct. This was the first such notice that he had given an employee in the twelve years he had been at the District.

No Disciplinary History

However, the District admits that there were no prior disciplinary actions of any sort in Maurer's District employment history. When asked why the District did not impose a less stringent discipline, Renley replied that the college had already given him several letters directing him to cease and desist specified actions. He admitted these letters were not formal letters of reprimand, nor were they placed in his personnel file.

Educational Code Requirements

The Educational Code requires the District, before it actually disciplines an employee for unprofessional conduct, to give him/her a ninety days written notice of the unprofessional conduct

specifying the nature thereof with specific instances of behavior and with particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. . . .

Pursuant to other provisions of the Education Code, the notice must be limited to circumstances that occurred during the prior four years.

CBA Limitations on Derogatory Material in Personnel File

However, the parties' CBA, in Article VII, section 9(a) states, in pertinent part:

Derogatory material placed in a Faculty Member's personnel file shall be destroyed upon the request of the Faculty Member when such material is more than three (3) years old.

The Notice of Unprofessional Conduct was given to Maurer on September 24, 2001. Therefore, anything dated prior to September 24, 1998, should not have been in his personnel file and available to support such notice. On the other hand, there was no evidence that Maurer ever asked that any material in his personnel file be destroyed. In addition, during the time that he was an administrator, either as the Dean of Technology or the Dean of Career/Vocational Education, he was not covered by the parties' CBA and any personnel documents

from this period of time were outside of its ambit. He was reassigned to a faculty position in December 1995. Therefore, any documentation in his personnel file dated between December 1995 and September 24, 1998, should have been destroyed upon his request pursuant to the CBA three-year limitation.

It should be noted that the CBA does not specifically prohibit documentation that is more than three years old from being used to support a negative personnel action, but the language supports such an inference. If the material is not supposed to be in the employee's personnel file, it follows that the intent of the parties was that it not be used against the faculty member.

Source of Unprofessional Conduct Allegations

When Renley was asked how he compiled the forty-eight separate examples of alleged misconduct he used to support the Notice of Unprofessional Conduct, he stated that the information was compiled from:

. . . various sources, and it was letters sent back and forth between Dr. Maurer, Bob Mendoza, Bob Dees, Chris O'Hearn, my correspondence with him.

ADMINISTRATIVE LAW JUDGE LINK: Okay, but her original question was these things were not in his personnel file?

THE WITNESS [Renley]: There may have been a couple of them that were in his personnel file, but the vast majority were not.

CBA Article VII, section 1, states, in pertinent part;

There shall be only one official personnel file for each Faculty Member, which is maintained at the District Office. The material in the official District personnel file shall be considered and used as the only official personnel record of the District in any proceeding affecting the status of the Faculty Member's employment with the District. The personnel file shall include, but need not be limited to, records of employment with the District and records of professional evaluation. In addition, such records as educational advancement and pertinent work

experience as provided by the Faculty Member shall be a part of the official District file. [Emphasis added.]

Maurer subpoenaed all documentation from college administrators that contained references to him. The District, in its responsive transmittal, provided 4486 pages of such documentation.

Notice of Unprofessional Conduct

The August 6, 2001, Proposed Notice of Unprofessional Conduct consists of an opening paragraph, forty-two "examples and incidents establishing the foregoing," and a closing paragraph. The opening and closing paragraphs, in their entirety, are as follows:

The Proposed Notice will be based upon the fact that within the past four years, you have frequently and repeatedly undermined the working relationships within your division and department, subverted the authority of the Dean, failed to work collegially with the Dean and other staff members, failed to follow numerous directives to work through the IAU and the Dean of your department, failed to follow established guidelines, rules and regulations of the District relating to Advisory Committee meetings, and have generally created a hostile working atmosphere for the Dean and other employees within your department at the College. . . .

.....

The specific instances recited above are given in order to provide you with an opportunity to correct your faults and overcome the unprofessional conduct. Failure to fully and completely correct the deficiencies will result in your dismissal from the District.

This opening statement was followed by forty-eight brief (often only one sentence) examples of allegedly unprofessional acts of Maurer.

Analysis

An examination of the forty-eight examples reveals that Examples 1, 2, 3 and 4 all fall during the excluded period of time. In addition, Example 47 states that Maurer allegedly

engaged in inappropriate activity “over the past four years.” The first of these four years would have been during the period of time excluded by the CBA.

Many of the examples contained little more than accusations that Maurer wrote (1) memos complaining about Mendoza’s management style, and/or (2) severely critical conclusions about Mendoza’s ability to do his job. A number of Maurer’s memos would seem to fall within the realm of academic freedom.

The parties’ CBA references academic freedom as follows:

ARTICLE VI. ACADEMIC FREEDOM AND RESPONSIBILITY

Section 1. Recognizing that free search for truth and the expression of diverse opinions are essential to a democratic society, both the District and the Federation will encourage and protect academic freedom.

Section 2. A Faculty Member shall not be subject to any adverse action affecting the Faculty Member’s employment status with the District:

.....

(e) For expressing in an appropriate forum the Faculty Member’s viewpoint on matters of College and District policy. [Emphasis added.]

Subsection 2(e) of CBA Article VI, supra, makes it clear that the parties anticipated a limit on the faculty members’ right to complain about college policy and its administrators.

Subsequent to Maurer’s receipt of the Notice of Unprofessional Conduct, and two days before the matter was to be heard by the Board of Trustees, Maurer requested a copy of all materials that were to be given to the Board of Trustees. Renley declined, but did provide the requested materials after the Board of Trustees’ meeting. Maurer also asked that some of the charges be dropped, as they involved protected activities and/or were the subject of academic freedom. Renley declined to amend the proposed notice.

Maurer requested, and was granted, a hearing open to the public, as opposed to a closed session. During this hearing, Maurer was given an unlimited amount of time to make his presentation to the board.

Prior to its consideration of the matter, the Board of Trustees was given copies of the proposed notice, along with all backup documents, as well as Maurer's written response. However, it was not given the documentation of support submitted on his behalf when he was removed from his position as Dean of Technology. This documentation, entered as an exhibit in this case, consisted of seven separate letters and a petition of support signed by forty-seven members of the faculty and staff of the Division of Technology. After hearing Maurer's presentation, the Board of Trustees approved the proposed notice. It was given to Maurer on September 24, 2001.

There was no evidence of any discipline of Maurer subsequent to the Notice of Unprofessional Conduct.

ISSUE

Did the District, when it (1) placed Maurer on administrative leave, (2) involuntarily transferred him, and (3) issued him a Notice of Unprofessional Conduct, discriminate against him because of his protected activities, thereby violating subdivision (a) of section 3543.5?

CONCLUSIONS OF LAW

In Novato Unified School District (1982) PERB Decision No. 210 (Novato), the Board set forth the test for retaliation or discrimination in light of the National Labor Relations Board (NLRB) decision in Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] enforced in part (1st Cir. 1981) 662 F. 2d 899 [108 LRRM 2513]. Under Novato, unlawful motivation must be proven in order to find a violation.

In order to establish a prima facie case, charging party must first prove that the subject employee engaged in protected activity.¹⁴ Next, it must prove that the person(s) who made the decision that resulted in the harm were aware of such protected activity. Lastly, a nexus or connection must be demonstrated between the employer's conduct and the exercise of a protected right, resulting in harm or potential harm to that right.

Proving the existence of unlawful motivation can be difficult. PERB acknowledged that when it stated the following in Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad), at page 11:

Unlawful motivation, purpose or intent is essentially a state of mind, a subjective condition generally known only to the charged party. Direct and affirmative proof is not always available or possible. However, following generally accepted legal principles the presence of such unlawful motivation, purpose or intent may be established by inference from the entire record. [Fn. omitted.]

Analysis

There is little doubt that Maurer engaged in protected activities, both when he filed an unfair practice charge with PERB and when he filed various grievances with the District.

The respondent, in its brief, stressed the personal nature of Maurer's grievances, as opposed to those that concern the working conditions of employees in the workplace other than the grievant. Granted, many of Maurer's grievances concerned issues that affected him directly. However, all had a potential effect on the other department's instructors, thereby supplying a collective indicia to them. This is apparent with regard to such issues as (1) the

¹⁴ Section 3543 grants public school employees:

(a) . . . the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . .

(b) Any employee may at any time present grievances to his . . . employer, and have such grievances adjusted,

Aviation and Space Department's class scheduling procedures, (2) the content of the program review report, (3) the advisory committee agenda and minutes, and (4) the attempted reassignment of the supervision of the department to someone other than Mendoza. Filing a grievance is protected conduct under North Sacramento School District (1982) PERB Decision No. 264, regardless of the personal nature of Maurer's grievances. Also, his filing of the unfair labor practice in May 2000 is sufficient protected conduct to satisfy the first element of the Novato test.

There is no doubt that Mendoza, Dees, Gratton and Renley, the primary decision-makers in this case, were aware of such activities. The fact that Gratton and Dees were not directly involved in the resolution of these filings is irrelevant; they were aware of them and knew of their potential to create a negative impact on the college and its staff. Therefore, the second element of the Novato test is satisfied.

The remaining element is whether a nexus exists between the employer's knowledge of these activities and the negative personnel action(s) taken.

First, Mendoza refused to submit a program review which included both his and Maurer's opinions, as suggested by Briese, OCC's program review coordinator. This suggests a sensitivity on Mendoza's part to even the most minor of criticisms. This sensitivity was at the heart of many of Maurer's complaints. It was the transmittal of these complaints to his second and third level supervisors that formed the basis of his Notice of Unprofessional Conduct.

The District, without any evaluation of Maurer's role in this process, took him to task for the department's failure to submit a completed report. This failure to examine the respective roles of the two men involved in the failure of the department to produce a program review report, suggests a pretextual justification for the District's complaints about Maurer.

This unsupported justification was also apparent in Mendoza's failure to approve advisory committee meeting minutes and agendas. It is apparent that Maurer was frustrated by Mendoza's refusal to acknowledge any sort of criticism. However, if the criticism was deserved, and there are no judgments being made at this point regarding whether it was or was not, the District's failure to determine its validity is inconsistent with its insistence that Maurer was wrong in bringing such alleged improprieties to its attention. This also falls within the prohibition set forth in Baldwin Park Unified School District (1982) PERB Decision No. 221, with regard to relying on a cursory investigation to support negative personnel actions.

The manner in which Maurer was placed on administrative leave also supports an inference of unlawful motivation. Maurer successfully taught at District colleges for twenty-five years, albeit the last few with a mixed personnel record. There was no precipitous violence-related event that immediately preceded his leave. Maurer did not hit or threaten to hit anyone. And yet, primarily on the word of one man, Mendoza,¹⁵ the District called Maurer in, and with no warning, placed him on leave, marched him to his office to retrieve personal items, and escorted him off campus. It compounded its precipitous action by warning him not to talk to any of his colleagues or students.

This campus expulsion occurred seventeen days after Maurer's meeting with Gratton and Dees, and approximately two weeks prior to the end of the semester. If the District contends that Maurer's behavior during his meeting with Gratton was so offensive and fraught with potential violence as to warrant the suspension, its delay of seventeen days before ordering him off campus and initiating an investigation constitutes an inconsistent explanation

¹⁵ The only other support for a conclusion that Maurer was potentially violent was (1) Bruning's 1995 incident, (2) Grant's equally dated subjective comment, (3) a somewhat dated comment by Olson, and (4) a stale complaint by Waters that must have occurred prior to 1995 because it referenced Maurer's position as Dean of Technology.

of its behavior. If the District contends that the offensive behavior and violent overtones at this meeting were minimal, Maurer's suspension two weeks before the end of the semester is inconsistent with this explanation of its behavior.

Irrespective of events that occurred more than five years previously, the District justifies its suspension on little more than (1) Mendoza's fears, (2) Maurer's facial expressions and a momentary staring contest with Dees, and (3) the throwing/dropping of a business card by an employee who has just been told that his last twenty-five years of education and training are no longer of value to his employer. This District action with regard to the administrative leave strongly supports a conclusion that the reasons given for it were pretextual.

With regard to the unprofessional conduct charge, it must be noted that it closely followed the District's determination there was no evidence to support a charge of impending violence. This brief time span, with no intervening negative Maurer behavior, suggests that the decision to serve such a notice was little more than a second opportunity to produce the same desired result, i.e., to remove Maurer from either the department or the college.

An analysis of the forty-eight examples cited by the District, lead to a conclusion that the reasons behind such notice were unsubstantiated. Therefore, they support an inference of unlawful motivation.

Three of the examples are no more than foundational sentences, Nos. 1, 33, and 38, such as:

On September 28, 1997, and on a number of subsequent occasions, you were specifically directed to work through the designed IUA and to keep him informed;

These examples seem to be included only to show that Maurer was warned not to continue his allegedly inappropriate behavior. They are not actual examples of inappropriate behavior.

Example No. 47 is a general summary of the others:

You have refused to work in a cooperative manner in the scheduling process over the past four years;

Example No. 4 deals with Maurer placing what he believed to be his personal property in a locked cabinet in the departmental storage area. The issue of whether the secured materials belonged to him or the department was, and still is, in dispute.

Example No. 17 accuses Maurer of denying the dean's assistant access to his personal office. He justified denial of access to all persons to his office on the grounds that papers had been missing in the past.

Example No. 48 accuses Maurer of (1) making the "its either the Dean or me" statement, which he denied, (2) throwing down an attorney's business card, and (3) leaving a meeting with administrators before they felt it was completed.

Example, No. 22 accuses Maurer of repeatedly failing to submit his office hours. His rebuttal was that the dean repeatedly refused to tell him what his class schedule was going to be. Absent a class schedule, it is very difficult to develop, much less submit, office hours.

Example No. 9, accuses Maurer of modifying the dean's student survey. In fact, the real problem was that Maurer sent out his own survey, the same one that he had routinely sent out in the past.

Eight examples, Nos. 6, 12, 13, 20, 24, 26, 41, and 46, accuse Maurer of failing to follow the chain of command in his memos or requested class schedules.

Four examples, Nos. 21, 37, 44, and 45, accuse Maurer of inappropriately sending copies of his criticism of the dean to students and members of the community.

The remaining thirty-two examples¹⁶ accuse Maurer of criticizing the dean or IUA.

Basically, Maurer is accused of three separate types of unprofessional conduct:

(1) criticism of Dean Mendoza (thirty-two examples), (2) failure to follow the chain of command (eight examples), and (3) involving the students and community members in intra-departmental disputes (four examples).

The CBA's academic freedom provisions state that a faculty member shall not be subject to any adverse action for expressing a viewpoint on college policy, insofar as it is in the appropriate forum. The involvement of students or outsiders in collegial affairs is a much more complicated issue and may be considered an "inappropriate" forum . However, the involvement of outsiders was a fairly minor part of his notice.

Aside from this possible exception, the above-cited "examples of his unprofessional conduct" would suggest to other members of the District's faculty that criticism of one's immediate supervisor in memoranda to second- and/or third-level supervisors is an inappropriate forum. This interpretation of academic freedom does not seem to leave any room for an honest difference of opinion on departmental policy, whether it concerns schedules, classroom allocation, department review documentation, or advisory committee agendas/minutes.

Certainly, Maurer's style lacked tact and, at times, was extremely combative. However, the District's examples of unprofessional conduct do not complain of inappropriate style, but rather of unprofessional content. For example, No. 2 states:

On January 24, 1998, you sent a memo to the Dean indicating that another instructor was incompetent to teach the classes for which he was scheduled.

¹⁶ The number of referenced examples will total more than forty-eight as some examples fit more than one category, e.g. No. 12, "On March 28, 1999 you sent a memo to the Vice-president, with a copy to the President, bypassing the Dean, complaining of the Dean's scheduling."

The Notice of Unprofessional Conduct does not explain under what circumstances Maurer made this statement, nor is Maurer's January 24, 1998, memo in evidence. In his rebuttal, however, Maurer stated that he told Mendoza that Padden had not maintained a current FAA license/rating/certificate in specified areas. He based this on information listed on the FAA (internet) database. Therefore, Maurer said, according to the college's own published job minimum qualifications, Padden was not eligible (competent) to teach courses that required the instructor to have current specified FAA ratings.

Given these circumstances, it would seem incumbent upon Mendoza and/or the college to examine the status of Padden's current FAA ratings, rather than chastising Maurer for bringing the matter to their attention.

To the extent the Notice of Unprofessional Conduct misrepresents and, in an unsubstantiated manner, escalates negative aspects of Maurer's behavior, it is inconsistent with the parties' CBA regarding academic freedom and chronological limitations on the use of personnel file documentation. Therefore, it supports an inference of unlawful motivation.

Maurer points to his classroom assignment in the fall of 2001 as a major inconsistency in the District's argument that he was a potential threat to Mendoza. Under his new duties in the Mathematics Department, he was assigned a classroom in the Technology Building in close proximity to Mendoza's office. In fact, he was much closer in the fall of 2001 than he had been in the spring of 2001, when he was a member of the Aviation and Space Department.

Dees insists that this was an oversight that was cured once it was brought to his attention during the formal hearing, and that all future assignments for Maurer would be in locations other than the Technology Building. These circumstances do not support an inference of unlawful motivation.

There were a number of additional circumstances that support a conclusion that the District's expressed reasons for the action taken against Maurer were pretextual.

First, both Maurer's administrative leave and his Notice of Unprofessional Conduct were effected as an initial form of discipline. During his time with the District, Maurer had no official reprimands, and with the exception of the difficulties he experienced at the time he was reassigned from dean to instructor, no negative comments.

The only justification offered by the District was that Renley did not believe a lesser form of discipline would be effective, and besides, Maurer had already received at least two letters directing him to correct his behavior. Renley admitted that these letters were not official letters of reprimand and were not placed in Maurer's personnel file. Two unofficial letters are insufficient to constitute a lesser form of discipline. Therefore, they do not lend support to the District's justification for the imposition of a Notice of Unprofessional Conduct as an initial level of discipline.

When the District declined to institute a lesser level of discipline, and instead imposed a major disciplinary action against Maurer for what amounts to an official first offense, it ignored the basic personnel practice of progressive discipline. Its action in this regard suggests an ulterior motive, and therefore, support an inference of unlawful motivation.

Second, Maurer was not given (a) a list of the complaints, (b) examples of his violence-related propensities or (c) reasonable access to the investigator. These are also violations of basic personnel procedures.

Third, Renley included information about Maurer's having filed a PERB unfair practice charge and grievances in the supporting documentation transmitted to the Board of Trustees with regard to placing him on administrative leave. This inclusion is in direct conflict with

section 3543, which grants employees the right to file such documents, without fear of retaliation.

Fourth, Renley's use of materials that were more than three years old to support the District's charges against Maurer appears to conflict with CBA Article VII 9(a) which requires that all material in a faculty member's personnel file more than three years old be destroyed.

Fifth, Maurer's summons to the April 27, 2001, meeting with Gratton and Dees did not include any hint that it would be disciplinary in nature. The circumstances of the meeting strongly support a conclusion that both Dees and Gratton, prior to the meeting, were aware of its general tenure. Maurer's belief that the meeting would afford him some sort of personal or departmental relief from Mendoza was a bit naïve, given the lack of support he had received up to that time. The District would argue that it was only Maurer's failure to work amicably with Mendoza that caused the meeting to become disciplinary. However, this failure was the reason the meeting was called in the first place, and the administrators were well aware that it was very unlikely that Maurer would suddenly mend his ways. There was no intervening circumstance that could have caused the administrators to believe that Maurer's attitude had changed. In the absence of a complete turnaround on Maurer's part, there was little doubt that he would be transferred from the Aviation and Space Department during this meeting. Both administrators knew this, and they failed to tell Maurer about it prior to the meeting.

If Maurer had Federation representation at that meeting, there is a possibility the "card tossing," "staring," and abrupt exit incidents would not have occurred. In their absence, the impetus for the administrative leave would not have been as immediate. The District's failure to notify Maurer of the potential disciplinary nature of the meeting is contrary to case law and is evidence that supports an inference of unlawful motivation. (See Redwood Community

College District v. PERB (1984) 159 Cal.App.3d 617 [205 Cal.Rptr. 523] and NLRB v. Weingarten, Inc. (1975) 420 U.S. 251, 256 [88 LRRM 2689].)

Sixth, CBA Article VII, section 1, states there shall be only one official personnel file for each faculty member and it shall be maintained in the District Office. It goes on to state that only material in such file "shall be considered and used . . . in any proceeding affecting the status of the Faculty Members' employment" Despite this provision, the District accumulated and gleaned over 4400 pages of documentation that provided the examples set forth in Maurer's Notice of Unprofessional Conduct. The use of this documentation supports an inference of unlawful motive.

All six of these examples lead to a conclusion that the District's expressed justifications were pretextual; and therefore support an inference of unlawful motivation.

The charging party suggests that Mendoza's failure to adhere to the collegial method of developing intradepartmental class schedules was another example of the District's failure to adhere to established procedures. However, the scheduling process is, in large part, vested in the respective deans. There was no evidence proffered that stated that Mendoza was required to follow this collegial procedure. This does not support an inference of unlawful motivation.

Due to all of the foregoing, it is concluded that an inference of unlawful motivation has been established. The burden now shifts to the respondent to demonstrate that it would have taken the same action even in the absence of protected activity. (Dees v California State University, Hayward (1991) PERB Decision No. 869-H.)

District's Justification for Its Actions

There is little doubt that Maurer and Mendoza were constantly in an adversarial mode; Dees just wanted the hassles between the two of them to stop; Gratton felt insulted by Maurer's abrupt departure from her April 27 meeting; and Renley just wanted to do whatever was

necessary to stop the controversy. It must be noted that none of these various reasons were based on opposition to Maurer's filing either grievances or an unfair labor practice.

On the other hand, the record is replete with examples of Maurer's failure to peacefully coexist with other employees. When he was the Dean of Technology, he had serious confrontations with OCC President Grant, Vice President for Instruction O'Hearn, four faculty members of the Construction Department, and the leadership of the Federation. After he returned to an instructor position, he had serious confrontations with OCC President Gratton, Vice President for Instruction Dees, Dean of Technology Mendoza, IUA Padden, and once again, the leadership of the Federation.

PERB has found that a significant failure of communication and deterioration of the relationship between a supervisor and a subordinate is a sufficient reason for an involuntary transfer, despite the protected activity of the employee. (See Scotts Valley Union Elementary School District (1994) PERB Decision No. 1052 and Fall River Joint Unified School District (1998) PERB Decision No. 1259.)

The OCC administration was faced with an employee, although a very capable instructor, who would not comply with its chain of command and would not accept the supervision of either his IUA or his dean. From a personnel perspective, the situation was untenable; something had to be done. It is concluded that when the administration took action to bring a halt to Maurer's inappropriate confrontations with his supervisors, its actions were justified.

It is therefore concluded that the District would have involuntarily transferred Maurer, placed him on administrative leave, and issued him a Notice of Unprofessional Conduct, regardless of his protected activity. Therefore, the complaint and underlying unfair practice charge should be dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CE-4309-E, Ernest W. Maurer, Ph.D. v. Coast Community College District, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required

number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Allen R. Link
Administrative Law Judge